IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER A. CURATO and CECELIA ANNE CURATO	:	CIVIL ACTION
v.	:	
GERALD M. SALUTI, et al.	:	NO. 98-2703

MEMORANDUM AND ORDER

HUTTON, J. December , 1999

Presently before this Court are Defendants Gerald M. Saluti ("Saluti"), Joseph P. Diebold ("Diebold"), IVAX Corporation ("IVAX Corporation"), and IVAX Industries, Inc.'s ("IVAX Industries") (collectively, the "Defendants") Motion for Summary Judgment and for Default Judgment (Docket No. 23), Plaintiffs Peter A. Curato ("Mr. Curato") and Cecelia Anne Curato's ("Ms. Curato") (collectively, the "Plaintiffs" or the "Curatos") response thereto (Docket No. 27), Defendants' Reply Brief (Docket No. 29), and Plaintiffs' Sur-Reply Brief (Docket No. 30). For the foregoing reasons, Defendants' Motion for Summary Judgment is **GRANTED in part** and **DENIED in part** and Defendants' Motion for Default Judgment is **DENIED**.

I. BACKGROUND

On February 6, 1997, Mr. Curato filed a Charge of discrimination with the Pennsylvania Human Relations Commission

("PHRC"). Said Charge complained of acts of age and gender discrimination. Mr. Curato received a right to sue letter on or about February 27, 1998, and timely filed the instant lawsuit. Plaintiffs amended their Complaint on or about June 22, 1998. Defendants filed their Answer, Affirmative Defenses, and Counterclaims on or about July 17, 1998. On February 5, 1999, Plaintiff filed a Second Amended Complaint, which for the first time stated a claim of retaliation. Defendants filed an Answer to the Second Amended Complaint on or about February 19, 1999.

Plaintiffs Second Amended Complaint makes the following claims: Count I) age-based employment discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. ("ADEA"); Count II) gender-based employment discrimination under Title VII of the 1964 Civil Rights Act ("Title VII"); Count III) age-based employment discrimination under the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 951 et seq.; Count IV) gender-based employment discrimination under the PHRA; Count V) breach of implied contract of employment and promissory estoppel; Count VI) intentional and negligent infliction of emotional distress; Count VII) defamation of character; Count VIII) loss of consortium; and Count IX) retaliation.

The factual allegations on which the Plaintiffs base their Second Amended Complaint are as follows. Mr. Curato was an employee and corporate officer of IVAX Industries. A female

employee of IVAX Industries, Maria Constantino ("Constantino"), over whom Mr. Curato exercised supervisory control, accused him of sexually harassing her. In response, certain of the Defendants attempted to discipline him for his actions without investigating the merits of her claims or his defenses. Ultimately, the discipline was never effected, however, because Mr. Curato left IVAX Industries on short-term and then long-term disability, and he did not return. Constantino also left the employ of IVAX Industries and eventually filed a Charge of sexual harassment with the PHRC, naming Mr. Curato as her harasser. IVAX Industries and Constantino eventually settled her Charge for $135,000.00.

On or about June 18, 1999, Defendants Saluti, Diebold, IVAX Corporation, and IVAX Industries filed a Motion for Summary Judgment and Default Judgment. On or about June 22, 1999, Plaintiffs filed Answers and Affirmative Defenses to Defendants' Counterclaims. On July 16, 1999, Plaintiffs filed a reply to Defendants' Motion. On July 23, 1999, Defendant responded to Plaintiffs' reply and on July 28, 1999, Plaintiffs filed a sur-reply.

II. LEGAL STANDARD

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. When the moving party does not bear the burden of persuasion at trial, as is the case here, its burden "may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading," id., but must support its response with affidavits, depositions, answers to interrogatories, or admissions on file. See Celotex, 477 U.S. at 324; Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657

(3d Cir. 1990).

To determine whether summary judgment is appropriate, the Court must determine whether any genuine issue of material fact exists. An issue is "material" only if the dispute "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. If the evidence favoring the nonmoving party is "merely colorable," "not significantly probative," or amounts to only a "scintilla," summary judgment may be granted. See id. at 249-50, 252; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)). Of course, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson, 477 U.S. at 255; see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255; see also Big Apple BMW, 974 F.2d at 1363. Thus, the Court's inquiry at the summary judgment stage is only the "threshold

inquiry of determining whether there is the need for a trial," that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250-52.

B. Default Judgment Standard

The entry of default and default judgment is governed by Federal Rule of Civil Procedure 55, which reads in pertinent part:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> (b) Judgment. Judgment by default may be entered as follows:
>
> (1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.
>
> (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor . . . .

Fed. R. Civ. P. 55(a)-(b). Generally, the entry of default and default judgment is disfavored because it prevents a plaintiff's claims from being decided on the merits. Thompson v. Mattleman, Greenberg, Shmerelson, Weinroth & Miller, No. CIV.A.93-2290, 1995 WL 321898, *3 (E.D. Pa. May 26, 1995); 10 Wright, Miller & Kane,

Federal Practice and Procedure § 2681 (1983).

The court is required to exercise "sound judicial discretion" in deciding whether to enter default judgment. "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when the defendant is technically in default." 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685. The court should consider a number of factors in determining whether to enter default and default judgment, including:

> the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; and whether plaintiff has been substantially prejudiced by the delay involved. Furthermore, the court may consider whether the default was caused by a good faith mistake or excusable neglect; how harsh an effect a default judgment might have; and whether the court thinks it later would be obliged to set aside the default on defendant's motion.

Franklin v. National Maritime Union of America, No. CIV.A.91-480, 1991 WL 131182, *1 (D.N.J. Jul. 16, 1991), aff'd, 972 F.2d 1331 (3d Cir. 1992) (TABLE), cert. denied, 507 U.S. 926 (1993) (citing 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685 (1983)).

The Third Circuit condensed those factors into a list of three: (1) prejudice to the moving party if default judgment is not granted; (2) whether the non-moving party has a meritorious defense; and (3) whether the non-moving party's delay was the result of culpable misconduct. Harad v. Aetna Cas. and Sur. Co.,

839 F.2d 979, 982 (3d Cir. 1988); De Bueno v. Bueno Castro, 822 F.2d 416, 149-20 (3d Cir. 1987); Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984); United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984); Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 656 (3d Cir. 1982); Estate of Menna v. St. Agnes Med. Ctr., No. CIV.A.94-2424, 1994 WL 504442, at *1 (E.D. Pa. Sept. 14, 1994) (citing Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984)). A standard of "liberality" rather than "strictness" should be used so that "any doubt should be resolved [against default] judgment so that cases may be decided on their merits." Medunic v. Lederer, 533 F.2d 891, 893-94 (3d Cir. 1976)(quoting Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3d Cir. 1951)).

III. DISCUSSION

Plaintiffs concede that as a matter of law they cannot prevail on Count I (age discrimination under the ADEA), Count III (age discrimination under the PHRA), and Count VII (defamation). (See Pls.' Reply to Defs.' Mot. for Summ. J. at 10). Plaintiffs also concede that as a matter of law they cannot prevail on their claim of negligent infliction of emotional distress. (See Pls.' Reply to Defs.' Mot. for Summ. J. at 10). Accordingly, the Court grants summary judgment as to each of these causes of action.

Plaintiffs argue, however, that their remaining causes of action must survive Defendants' instant Motion. The Court hereafter considers each claim.

1. Gender-based employment discrimination under Title VII and the PHRA

Defendants argue that Plaintiffs cannot establish a prima facie case of gender discrimination.[1] In the alternative, Defendants argue that even if Plaintiffs could make out prima facie cases of gender discrimination, their claims ultimately must fail because Defendants had legitimate, nondiscriminatory, and nonpretextual reasons for its actions.

Claims of Title VII discrimination may be substantiated by presentation of direct evidence of discrimination, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), or evidence which creates an inference of discrimination. United States Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983). Indirect evidence is that from which the trier of fact infers discrimination. Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994). Where a plaintiff does not present direct evidence of discrimination, his or her Title VII claims must be evaluated under the McDonnell Douglas/Burdine burden shifting framework.

[1] Because the PHRA and Title VII are so similar, courts in the Third Circuit have generally interpreted provisions of the PHRA consistently with those of Title VII. See, e.g., Clark v. Com. of Pennsylvania, 885 F. Supp. 694 (E.D. Pa. 1995); Barb v. Miles, Inc., 861 F. SUPP. 356 (W.D. Pa. 1994) (stating that "courts have uniformly held that PHRA should be interpreted consistently with Title VII"). Therefore, the Court concurrently considers Plaintiffs' Title VII and PHRA claims as the same analytical framework is employed under each statute.

The Supreme Court established the following four-part test for establishing a prima facie Title VII discrimination claim: Plaintiff must show that (1) he is a member of a protected class, (2) he was qualified for his position, (3) he suffered an adverse employment action, and (4) others who are not members of his protected class were more favorably treated. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 80 (1973). The plaintiff need not demonstrate, however, that his or her position was filled by someone not a member of his or her class in order to meet this burden. See Pivirotto v. Innovative Sys. Inc., 191 F.3d 344, 355-56 (3d Cir. 1999).

Once a plaintiff satisfies the now familiar four-part test, thereby establishing a prima facie case, there arises a presumption of discriminatory intent by the defendant-employer. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). Although the ultimate burden of persuasion remains with the plaintiff, the burden of production shifts to the defendant-employer who must explicate a nondiscriminatory, legitimate justification for its treatment of the plaintiff. Id. at 507. To satisfy its burden, the defendant-employer must clearly set forth through the introduction of admissible evidence, the reasons for the plaintiff's allegedly unlawful treatment. Burdine, 450 U.S. at 255. The defendant-employer must only explain clearly the

nondiscriminatory reasons for its actions, however. Id. at 260. If the defendant-employer satisfies its burden, the presumption is rebutted and thereafter drops from the case. Id. at 255 & n.10.

The plaintiff, to prevail on his or her discrimination claim, must then prove by a preponderance of the evidence the legitimate reasons proffered by the employer "were not its true reasons, but were a pretext for discrimination." McDonnell Douglas, 411 U.S. at 802. Therefore, to survive summary judgment where an employer-defendant articulated a legitimate nondiscriminatory reason for its actions,

> the plaintiff must point to evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.

Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

In the instant case, Plaintiffs neither allege nor offer any direct evidence of gender discrimination. Accordingly, Plaintiffs' claims are analyzed pursuant to the McDonnell Douglas/Burdine burden shifting framework. Therefore, Plaintiffs must establish a prima facie case of discrimination per the framework's four-part test. See Burdine, 450 U.S. at 252-53.

As Plaintiffs clearly satisfy the first three elements of their prima facie case, the Court focuses on the parties' arguments regarding the test's fourth element. Plaintiffs'

argument is predicated upon a comparison of the treatment afforded by the Defendants to Mr. Curato and Constantino, (see Pls.' Reply to Defs.' Mot. for Summ. J. & Default J. at 13 n.7 ("It is the disparate treatment of Maria Constantino and Peter Curato which is at issue in this case.")). Plaintiff contends that Defendants incorrectly believed that Mr. Curato committed sexual harassment solely because he is a man and the complainant, Constantino, is a woman. Plaintiffs further argue that Defendants' discriminatory animus was evidenced by their willingness to credit Constantino's claims while simultaneously discrediting Mr. Curato's statements that her allegations were fabricated. Plaintiffs contend that Defendants' actions amounted to gender discrimination in that Constantino's PHRC charge was treated as a "simple case of 'believe her-fire him.'" (Pls.' Reply to Defs.' Mot. for Summ. J. & Default J. at 8). The Court finds that Plaintiffs satisfy each element of their prima facie case.

Once a plaintiff establishes a prima facie case, the burden of production passes to the defendant to articulate a legitimate, nondiscriminatory reason for the action. Once the defendant satisfies his or her burden, the plaintiff must either discredit the proffered reason or show that the employer's action was premised on a discriminatory basis. See Sheridan, 100 F.3d at 1067.

Defendants argue that they disciplined Mr. Curato pursuant to the belief that he treated his subordinates, including Constantino, in a manner that fostered an undesirable work environment. (See Defs.' Mot. for Summ. J. at 16). As the Court finds that Defendants satisfy their minimal burden, the Court's attention necessarily shifts to Plaintiffs' attempt to show that Defendants' adverse employment action had a discriminatory premise.

Plaintiffs allege that Defendants' proffered reason for disciplining Mr. Curato is subverted by, inter alia, the existence of internally-inconsistent documents, the possible existence of manufactured evidence, the disappearance of IVAX Industry documents that would corroborate Mr. Curato's recollection of pertinent events, and mischaracterizations of statements attributed to Mr. Curato and his former co-workers. (See Pls.' Reply to Defs.' Mot. for Summ. J. & Default J. at 14-18). In light of the foregoing, the Court finds that Plaintiffs cast sufficient doubt on Defendants' proffered reasons for their adverse employment action regarding Mr. Curato such that genuine issue of material fact exist and judgment as a matter of law is inappropriate. Accordingly, Defendants' Motion for Summary Judgment is denied as it relates to Plaintiffs' Title VII and PHRA claims of gender discrimination.

2. Retaliation

Title VII makes it unlawful for an employer to retaliate against an employee who has opposed any practice unlawful under Title VII. 42 U.S.C. § 2000e-(3)a. To prevail on a retaliation charge, Plaintiffs must evidence the following: (1) Mr. Curato engaged in conduct protected under Title VII; (2) his employer took an adverse employment action against him; and (3) a causal link exists between his protected conduct and his employer's adverse action. Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 201 (3d Cir. 1994).

Under § 2000e-5(e), a charge of employment discrimination must be filed within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e). This filing is a prerequisite to a civil suit under Title VII. West v. Philadelphia Elec. Co., 45 F.3d 755, 754 (3d Cir. 1995). When a retaliation claim is not specifically presented to an administrative agency (e.g., the Pennsylvania Human Relations Commission ("PHRC") or the Equal Employment Opportunity Commission ("EEOC")), the test for whether that claim can be presented to the district court is "whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). See also Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984).

Defendants argue that the Court cannot consider the merits of Plaintiffs' retaliation claim because Mr. Curato failed to exhaust his administrative remedies regarding said claim. In the alternative, Defendants argue that Plaintiffs' claim must fail for they cannot satisfy the legal standard for stating a retaliation claim.

It is undisputed that Plaintiffs never filed a retaliation claim with the EEOC or PHRC. Therefore, the Court may lawfully assume jurisdiction over Plaintiffs' additional charge of retaliation only if said charge is reasonably within the scope of the original charges filed with the PHRC or EEOC, or if a reasonable investigation by that agency would have encompassed the new claims. Plaintiffs' retaliation claim is based on the belief that Defendants' counterclaims were brought to retaliate against Plaintiffs. (See Second Amend. Compl. at § 93 ("The counterclaims if IVAX Industries, Inc., have been devised to retaliate against Plaintiff . . . ."). As such, the Court considers the parties' arguments in this context.

It cannot be credibly argued that the PHRC or the EEOC could have been expected to initiate a retaliation investigation based on Mr. Curato's charge. See Fosburg v. Lehigh Univ., No. CIV.A. 98-CV-864, 1999 WL 124458, at *6 (E.D. Pa. March 4, 1999); Watson v. SEPTA, No. CIV.A. 96-1002, 1997 WL 560181, at * 6-7 (E.D. Pa. Aug. 28, 1997). Moreover, it cannot be credibly argued

that an administrative agency's investigation would have reasonably discovered retaliation in the context of Defendants' Counterclaims to Plaintiffs' federal lawsuit.

Ultimately, Plaintiffs should have first filed a retaliation charge with an administrative agency such as the PHRC. Doing so would have allowed that agency to bring to bear its specialized knowledge and expertise in deciding whether Defendants unlawfully discriminated against Mr. Curato. Accordingly, Plaintiffs failed to exhaust their administrative remedies with regard to their retaliation claim and on this basis the Court grants Defendants' Motion for Summary Judgment as to said claim.

3. Intentional infliction of emotional distress

The Pennsylvania Supreme Court stated that the tort of intentional infliction of emotional distress is defined as follows.

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Hoy v. Angelone, 720 A.2d 745, 753 (Pa. 1998) (quoting Restatement (Second) of Torts § 46(1) 1965)). Under Pennsylvania law, "recovery for the tort of intentional infliction of emotional distress [is] reserved . . . for only the most clearly desperate and ultra extreme conduct . . . ." Id. at 754. , Courts are reluctant to allow liability to attach under this

cause of action. Id. A claim may only be proven if the conduct is extreme or clearly outrageous, so at to exceed all bounds of decency, and so as "to be regarded as atrocious[] and utterly intolerable in a civilized society." Id. at 754 (citation omitted). It is not enough that a defendant acts with intent which is tortious or carried out with the intent to inflict emotional distress. Id. (citations omitted).

Plaintiffs allege that the Defendants intentionally inflicted emotional distress when they breached their duty "to act reasonably to protect [Mr. Curato] from being fired on the basis of age or sex or other specious or unfounded allegations without probable cause" and that "Defendants conduct was deliberately designed to cause [Mr. Curato] extreme mental and emotional distress and was outrageous conduct which was expressly designed to 'cut [Mr. Curato] out' of any profits from the business entity, leaving more for each of Saluti and Diebold." (Pls.'s Second. Amend. Compl at ¶¶ 74 & 76).

It is the Court's obligation to find that Defendants' conduct is so extreme and outrageous as to permit recovery. Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). That said, it is extremely rare to find sufficient grounds in the employment context to impose liability for the intentional infliction of emotional distress. Hoy, 720 A.2d at 754. The Court finds that the grounds propounded by Plaintiffs for finding

intentional infliction of emotional distress simply are not sufficiently extreme or outrageous so as to render appropriate or just a finding of liability. Indeed, allowing Plaintiffs to go forward on this cause of action under this particular set of facts would not only eviscerate this tort but would unduly and unreasonably hinder the day-to-day conduct of businesses and business people. Accordingly, Defendants' Motion for Summary Judgment is granted at to Plaintiffs' claim of intentional infliction of emotional distress.

4. Breach of implied contract of employment and promissory estoppel

The record before the Court evidences a genuine and material conflict regarding the terms and conditions of the express contract or contracts that each party alleges existed during the tenure of Mr. Curato's employment at IVAX Industries. For example, Defendants allege that in exchange for continued employment, Mr. Curato agreed to no longer "abuse" or "mistreat" his co-employees. (See Defs.' Counterclaims at ¶¶ 105-106). Defendants describe this commitment as a "contractually binding term of [Mr. Curato's] employment contract." (Defs.' Counterclaim at ¶ 122). Defendants allege that Mr. Curato ultimately violated his commitment, thereby breaching his contract with Defendants.

On the other hand, Plaintiffs allege that Mr. Curato had an

express contract with the Defendants, the terms of which enabled him to collect valuable compensation in exchange for his agreement to move to the Philadelphia, Pennsylvania-area to continue his employment at IVAX Industries. Plaintiffs allege that the manner in which Defendants terminated Mr. Curato's employment constitutes a breach of the duty of good faith and fair dealing.

Defendants counter Plaintiffs' argument by contending that Mr. Curato was an at-will employee of IVAX Industries and that under Pennsylvania law, Mr. Curato could have therefore been terminated for good cause or no cause at all. Thus. Defendant's argue that Plaintiffs cannot state a cause of action based in contract regarding Mr. Curato's termination because as an at-will employee, Mr. Curato could have terminated for almost any reason whatsoever.

The Court notes that it should not act other than with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2502, 2513 (1986) (citation omitted). Moreover, a summary judgment motion, such as that which is before the Court, requires an assessment of, inter alia, what a fair-minded jury could reasonably decide. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1898). In

light of the foregoing, the Court is unable to determine as a matter of law that the parties did not have a contract regarding, inter alia, Mr. Curato's continued employment at IVAX Industries for which Mr. Curato provided sufficient consideration so as to extend his employment for a reasonable time. Therefore, the Court denies Defendants' Motion for Summary Judgment on Plaintiffs' claims of breach or contract and promissory estoppel.

5. Loss of consortium

Ms. Curato, Mr. Curato's spouse, asserts a claim for loss of consortium. Loss of consortium is defined as a loss of services, society, and conjugal affection of one's spouse. Bedillion v. Frazee, 183 A.2d 341, 343 (Pa. 1962). A loss of consortium claim arises from the marital relationship and is premised on the loss of a spouse's services after injury. Tiburzio-Kelly v. Montgomery, 681 A.2d 757, 772 (Pa. Super. Ct. 1996). One who suffered a loss of consortium did not sustain a physical injury but rather experienced an injury to marital expectations. Darr Constr. Co. v. Workmen's Compensation Appeal Bd., 715 A.2d 1075, 1079 (Pa. 1998). Any action for loss of consortium is derivative, however, and the viability of such a claim depends upon the substantive merit of the injured party's claims. Schroeder v. Ear, Nose & Throat Assoc. of Lehigh Valley, Inc., 557 A.2d 21, 22 (Pa. Super. Ct. 1989). While derivative of his or her spouse's substantive claims, a spouse's loss of consortium

claim is considered a distinct cause of action. Manzitti v. Amsler, 550 A.2d 537, 538 (Pa. Super. Ct. 1988). Accordingly, where a spouse's substantive claim survives a motion for summary judgment, a loss of consortium claim, as a derivative cause of action, also survives. Therefore, because several of Plaintiffs' substantive claims survive (i.e., the gender discrimination claims that relate to Defendants' treatment of Mr. Curato) Defendants' Motion for Summary Judgement, Ms. Curato's loss of consortium claim also survives. Defendants' Motion for Summary Judgment as to Ms. Curato's loss of consortium claim is denied.

6. Defendants' Motion for Default Judgment

As stated above, the Third Circuit uses three factors when considering whether a default judgment should be entered: (1) prejudice to the moving party if default judgment is not granted; (2) whether the non-moving party has a meritorious defense; and (3) whether the non-moving party's delay was the result of culpable misconduct. See, e.g., Harad v. Aetna Cas. and Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988); Estate of Menna v. St. Agnes Med. Ctr., No. CIV.A.94-2424, 1994 WL 504442, at *1 (E.D. Pa. Sept. 14, 1994) (citing Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984)). In considering a Motion for Default Judgment under the rubric of the above three factors, the Court is cognizant that a standard of "liberality" should be employed

so that "any doubt should be resolved [against default] judgment so that cases may be decided on their merits." Medunic v. Lederer, 533 F.2d 891, 893-94 (3d Cir. 1976)(quoting Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3d Cir. 1951)).

Defendants' Motion for Default Judgment, which they filed on or about June 18, 1999, argues that the requested relief is appropriate as the Plaintiffs never, inter alia, responded to their Counterclaims. However, Plaintiffs filed an Answer to Counterclaims of Defendant IVAX Industries on or about June 22, 1999. Therefore, while untimely, Plaintiffs' filing of Answers and Affirmative Defenses moots Defendants' argument for entry of default. Therefore, Defendants' Motion for Default Judgment is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER A. CURATO and CECELIA ANNE CURATO	:	CIVIL ACTION
v.	:	
GERALD M. SALUTI, et al.	:	NO. 98-2703

O R D E R

AND NOW, this day of December, 1999, upon consideration of Defendants Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation, and IVAX Industries, Inc.'s (collectively, the "Defendants") Motion for Summary Judgment and for Default Judgment (Docket No. 23), Plaintiffs Peter A. Curato ("Mr. Curato") and Cecelia Anne Curato's ("Ms. Curato") (collectively, "Curatos") response thereto (Docket No. 27), Defendants' Reply Brief (Docket No. 29), and Plaintiffs' Sur-Reply Brief (Docket No. 30), IT IS HEREBY ORDERED that:

1) Defendants' Motion for Summary Judgment is **GRANTED** with regard to Plaintiffs' claims of age-based employment discrimination under the Age Discrimination in Employment Act, age-based employment discrimination under the Pennsylvania Human Relations Act, intentional and negligent infliction of emotional distress, defamation of character, and retaliation; and

2) Defendants' Motion for Summary Judgment is **DENIED** with regard to Plaintiffs' claims of gender-based employment discrimination under Title VII of the 1964 Civil Rights Act,

gender-based employment discrimination under the Pennsylvania Human Relations Act, breach of implied contract of employment and promissory estoppel, and loss of consortium.

IT IS FURTHER ORDERED that Defendants' Motion for Default Judgment is **DENIED**.

BY THE COURT:

_____
HERBERT J. HUTTON, J.